No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, which does not contain a preemption provision and which expressly saves "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, divests a state court from applying state law to allow an arbitrator to order arbitration to proceed on a class-wide basis where state law allows class arbitrations and the state substantive law underlying the claim expressly reserves the right of injured parties to bring a class action.

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BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This case involves Petitioner Green Tree's pervasive and knowing violation of the South Carolina Consumer Protection Code ("Consumer Code") in more than 3,700 real estate secured loan transactions made by Green Tree in South Carolina. As found by the Arbitrator – chosen pursuant to the process devised by Green Tree itself in adhesion contracts forced upon consumers – Green Tree "has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement." Pet. App. 91a. After the Arbitrator certified a class of similarly situated consumers and then awarded damages for Green

Tree's knowing and repeated violations of South Carolina's Code, Green Tree fought enforcement of the arbitral award in South Carolina's state courts, which uniformly upheld the Arbitrator's decision to proceed on a class-wide basis.

In this Court, Green Tree broadly asserts "conflicts" with a variety of federal and state courts over whether a class arbitration may be permitted to proceed. In framing that issue, Green Tree ignores that the Federal Arbitration Act ("FAA") contains no preemption provision and expressly reserves a role for state law. Moreover, Green Tree misreads the cases as supposedly in conflict. The federal cases that it cites hold that the Federal Rules of Civil Procedure do not authorize *federal* courts to order class arbitrations, but those cases do not address (or, indeed, expressly reserve) the situation present here: a state court applying state law to uphold a state arbitration that construes the contract between the parties to permit the arbitration to proceed on a class-wide basis. Although several States have construed their own state law not to permit class arbitrations, such differences are irrelevant to this Court's normal standards for granting certiorari – whether courts are in conflict on the *same* law.

STATEMENT

1.a. In 1982, the South Carolina General Assembly ("General Assembly") amended the Consumer Code by eliminating caps on the interest rates that lenders could charge for consumer credit and authorizing certain fees for lenders. To protect consumers against predatory lending practices in real estate secured transactions, the General Assembly enacted an additional requirement mandating that lenders advise consumers of their right to obtain their own attorneys and insurance agents and requiring lenders to record on the first page of the credit application the consumer's preference for those representatives who would provide professional services at the closing of real estate transactions. S.C. Code Ann. § 37-10-102 (the "Preference Statute"). The purpose behind the law was to prevent salesmen who sell home improvements, mobile homes, and other

home appurtenances from locking consumers into usurious interest rates for such items and securing those loans with the consumer's real estate without the benefit of an attorney and insurance agent to give advice. Under early versions of the law, if a lender violated the Preference Statute, consumers could obtain forfeiture by a creditor of the total amount of the loan finance charge, repayment of double the amount of interest collected, and costs of the action and repayment of the balance of the loan without any loan finance charges. *See Tilley v. Pacesetter Corp.*, 508 S.E.2d 16 (S.C. 1998). The Preference Statute at that time did not alter in any way the right of consumers to proceed against violators of the statute on a class-wide basis by filing suit in state court.

In 1997, the General Assembly amended the Preference Statute and altered the penalty for violations from a calculation based upon specific dollar amounts of the transaction to a penalty range limited to $1,500 to $7,500. Given Green Tree's pervasive and repeated violations of the Preference Statute, the 1997 amendments effectively reduced the dollar value of the penalty that could be assessed against Green Tree by more than $150 million in the case involving the *Lackey* Respondents alone. In addition, the General Assembly changed the statute of limitations and precluded future class actions for violations of the Preference Statute. The same amendment, however, directed that all Preference Statute cases filed as class actions prior to May 2, 1997, "may proceed" subject to application of the new penalty range.

In *Tilley*, the South Carolina Supreme Court held that the Preference Statute could be enforced through a class action for violations arising before the 1997 amendment in a case involving a door-to-door seller of aluminum windows, awnings, and doors who secured the transactions with mortgages on the consumers' residences. The seller-creditor failed to ascertain the consumers' preferences of attorney and insurance agent and failed to use attorneys in the transactions. The state supreme court emphasized that

the Preference Statute must be liberally construed in compliance with provisions of the Consumer Code. 508 S.E.2d at 19.

b. The two cases at issue here involve two types of transactions: home-improvement transactions secured by real estate and manufactured-housing transactions secured by real estate.

The Bazzle transaction is typical of a home-improvement transaction. A home-improvement contractor offering financing through Green Tree, a subprime lender, would solicit customers door-to-door, offering home-improvement services. The Green Tree dealer would advise the consumer that home improvements could be financed, and the consumer would complete a credit application to be submitted to Green Tree. Pet. App. 61a. The terms of the credit were not disclosed. If the consumer agreed to purchase home improvements, the Green Tree dealer or one of its employees would return to the consumer's home with the transaction documents. All of the transaction documents were standard preprinted form contracts of adhesion prepared by Green Tree. All of the terms of financing were set by Green Tree, including the rate of interest. *Id.* at 61a-62a. The documents, if explained at all, were not prepared or reviewed by an attorney. The consumers were not given a Preference Statute disclosure. *Id.* at 61a. Many consumers did not understand that they were securing the credit transaction with a mortgage on their home. Generally, the consumers would learn later of the mortgage when they attempted to sell or refinance their home. Only one person would be available to witness the signing of the mortgage at the closing. No attorney for the consumer was involved in the transaction. *Id.* at 62a.

Green Tree's manufactured-housing transactions would proceed in a similar fashion. The consumers would enter into preprinted consumer installment contracts and security agreements with Green Tree to purchase a mobile home. *Id.* at 87a-88a. Green Tree's dealer would obtain a credit application for Green Tree from the consumer. The

credit application did not include the required Preference Statute disclosure. If Green Tree elected to extend credit, it would set the terms of the credit, prepare all the necessary documents for closing, and transmit the documents to its dealer. The documents included a mortgage prepared by Green Tree. The dealer would have the consumer execute the documents without explanation. The mortgage, on its face, directed the local recording office to return it directly to Green Tree. No attorney was involved in the transaction. *Id.* at 88a.

c. The documents used in these transactions are contracts of adhesion prepared by Green Tree. Both cases involved preprinted form consumer Retail Installment Contracts and Security Agreements ("RICSA") and Mortgages. The adhesion RICSA drafted by Green Tree provides, in pertinent part: "You agree this contract will be governed by the law of the State of South Carolina." R. App. 2162. The mortgage prepared by Green Tree provides: "The state and local laws applicable to this Mortgage shall be the laws of the jurisdiction in which the Property is located." *Id.* at 3045.

The RICSA in both classes contained an arbitration provision that reads in part as follows:

> The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract.

Pet. App. 110a. Neither the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions.

2.a. In March 1997, Lynn and Burt Bazzle commenced an action against Green Tree for violating the Preference Statute involving home-improvement transactions secured by real estate. *Id.* at 56a. Shortly after the case was filed,

Green Tree moved to compel arbitration under the terms of its adhesion contract. *Id.* In late 1997, the South Carolina trial court granted the Bazzles' motion for class certification and then granted Green Tree's motion to compel arbitration. *Id.* at 56a-57a. Both the South Carolina court of appeals and supreme court denied Green Tree's attempts to obtain appellate review of the trial court's rulings on the ground that such an appeal was interlocutory. *Id.* at 57a-58a. The case was then referred to the appointed Arbitrator. *Id.* at 58a. While in arbitration, Green Tree moved to dismiss or in the alternative to decertify all or a portion of the class, *id.* at 29a, placing squarely before the Arbitrator the issue of class arbitration. The Arbitrator denied the motion. *Id.*

After conducting a hearing, the Arbitrator – at that time a sitting retired state circuit court judge – issued his written Award. *Id.* at 55a-81a. The Arbitrator found Green Tree liable for violating the Preference Statute and awarded relief on a class-wide basis. The Arbitrator found that Green Tree submitted virtually no evidence of compliance with the Preference Statute enacted years earlier. The Arbitrator noted:

> Green Tree offered no evidence of any nature that after it was sued by [other consumers] in 1994 that it attempted to comply with the preference statute . . . .
>
> . . . After five suits, including [the *Bazzle* suit], having been brought against Green Tree for failing to comply with the preference statute, it still continued to refuse to take any action or to adhere to the statute's requirements. . . . Thus, based on the testimony and the evidence of record, I find that Green Tree simply chose to totally ignore the law despite learning of the requirement. As a result of its behavior, Green Tree's conduct rises to a shocking level of callous and reckless indifference to the rights of South Carolina residents.

Id. at 67a-68a.

The Arbitrator also heard evidence about other actions initiated against Green Tree for violating the Preference Statute and other legal actions brought against other lenders. That evidence provided a range of the penalties imposed in other cases that the Arbitrator used in fashioning a damages award. In one such case, the Arbitrator drew attention to the testimony of Green Tree's in-house counsel who "unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent." *Id.* at 63a. Green Tree resolved that case by paying the injured party $50,000 and satisfying the original note and mortgage in the amount of $15,000. R. App. 3173.

The Arbitrator held that one such case clearly established that, in late 1994, Green Tree had actual notice of the Preference Statute, and that the case demonstrated Green Tree's willful non-compliance with the consumer protection statute. Pet. App. 63a-64a. The Arbitrator found that, "[a]fter learning of the preference statute, Green Tree did nothing. It failed to provide the notice. It failed to use attorneys for the transactions." *Id.* at 68a. The Arbitrator concluded that testimony and other evidence clearly showed an ongoing pattern and practice that began as a careless or negligent attitude and graduated into a willful non-compliance and disregard for South Carolina law. *Id.* at 69a.

Based on these determinations and consideration of the available penalty of $1,500 to $7,500, as well as the record before him, the Arbitrator awarded $5,000 to aggrieved consumers in 1,323 home-improvement transactions that occurred prior to the time Green Tree had notice of its non-compliance. For the remaining 576 home-improvement transactions that occurred after Green Tree had actual notice of its obligation under the Preference Statute and still did nothing to comply, the Arbitrator awarded $7,500 per transaction.

In accordance with applicable state law, the Bazzles filed a motion to confirm the award in South Carolina trial court,

and Green Tree filed a motion to remand the award for amendment and clarification. On September 15, 2000, the lower court denied Green Tree's motion and confirmed the award of the Arbitrator, determining that the Arbitrator acted within his authority to hold Green Tree liable on a class-wide basis. Green Tree again appealed, and the South Carolina Supreme Court assumed jurisdiction to hear the appeal in consolidation with the *Lackey* case.

b. The *Lackey* case was filed as a class action in state court in May 1996. Those Respondents alleged violations of the Preference Statute by Green Tree in manufactured-home and home-improvement transactions secured by South Carolina real estate (with the home-improvement transactions subsequently being transferred and consolidated with the *Bazzle* matter). Pet. App. 87a. Green Tree filed an answer and the *Lackey* plaintiffs moved for class certification. Green Tree then moved to stay and compel arbitration. The lower court denied Green Tree's motion to compel and ruled the arbitration clause unconscionable. Green Tree appealed and the South Carolina court of appeals reversed, finding that the contract was a contract of adhesion but not unconscionable and directing that the case be compelled to arbitration.

The Arbitrator held a hearing on whether the Green Tree arbitration agreement, ruled to be a contract of adhesion, prevented class arbitration. After the hearing, in which Green Tree participated, the Arbitrator determined that the arbitration clause drafted by Green Tree did not preclude class arbitration. The Arbitrator then held a second hearing on class certification and granted class certification. Green Tree filed several actions in state and federal courts contesting the decision of the Arbitrator. Each court refused to grant the relief sought by Green Tree, ruling that it had no jurisdiction to intervene in an ongoing arbitration proceeding.

After conducting a hearing on the merits, at which Green Tree did not submit any evidence demonstrating compliance with the Preference Statute, the Arbitrator noted that

Green Tree admitted "that it did not comply with the attorney and insurance agent preference statute: It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to September 1995, the attorney and insurance agent preference requirement as impounded in *Tilley*, was not complied with." Pet. App. 67a n.4. In addition, Green Tree did not seek a legal opinion from counsel regarding all South Carolina statutes applicable to its real estate secured transactions in South Carolina. *Id.* at 98a.

The state trial court then denied Green Tree's motion to remand and vacate the final order of the Arbitrator, and confirmed Respondents' motion to confirm the award. On appeal by Green Tree, the state supreme court accepted jurisdiction and consolidated the *Bazzle* and *Lackey* cases.

3. The South Carolina Supreme Court unanimously affirmed the trial court's judgment to uphold the Arbitrator's determination that the arbitration clause drafted by Green Tree did not preclude class arbitration and that both the *Bazzle* and the *Lackey* cases could proceed before the Arbitrator as class actions. The court explicitly stated that its decision was consistent with long-standing state and federal authority requiring the resolution of any doubts concerning the scope of arbitrable issues in favor of arbitration. Pet. App. 17a.

The court explained that it had already construed Green Tree's arbitration clause in a prior case, in which it had held that "'general principles of state law apply to arbitration clauses governed by the FAA.'" *Id.* (quoting *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001)). The court then examined the specific language of the arbitration provision in Green Tree's adhesion contract and construed the provision under long-standing state law contract construction principles, emphasizing that any ambiguity in the contract "should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id.* (citing *Myrtle Beach Lumber Co. v. Willoughby*, 274 S.E.2d 423 (S.C. 1981)). As the court reasoned, "[a]fter all, the drafting

party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Id.*

The court analyzed whether, notwithstanding state law permitting class arbitrations, federal law compelled the opposite result. The court below observed that certain federal courts had followed *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which the court described as articulating the "federal approach," Pet. App. 12a n.11, to deny class arbitration in cases brought in federal court under FAA § 4. The state supreme court reasoned that it was not obliged to follow *Champ* because that case rested on an application of § 4, which by its plain terms involves a petition to a "*United States district court*." *Id.* at 20a. For that reason, the court determined that the application of FAA § 4 to actions brought to enforce arbitrations in state court was "debatable." *Id.*; *see also id.* (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989)).

The court then emphasized that its decision rested on independent state law grounds:

> In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions. No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so.

Id. at 20a-21a (footnote, internal quotation marks omitted).

After setting out those principles of state contract law, the state supreme court determined as a preliminary matter that Green Tree's clause was silent regarding class arbitration and that its omission should be construed against it as the drafting party. *Id.* The court specifically rejected Green Tree's argument that the singular language of the clause stating claims relating to "this contract" precludes class arbitration. *Id.* at 19a. The court found that the language did not limit the arbitration to non-class arbitration but rather, at best, created an ambiguity, which under state law should be construed against Green Tree as the drafting party. *Id.* at 21a. The court then announced that, under South Carolina law, "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.

The court noted that such a rule had particular force when viewed from the perspective of a court's review of an arbitrator's decision. The court read this Court's decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001) (per curiam), to announce a highly deferential rule for the review of an arbitrator's decisions: "If an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision." Pet. App. 23a. Given the "narrow standards of review in both cases," the court upheld the Arbitrator's awards in both the *Bazzle* and *Lackey* cases. *Id.* at 23a-24a (noting that "Green Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the first three justifications listed in section 10 of the FAA"). The court then noted that the only other justification in FAA § 10 for overturning an arbitrator's award is "manifest disregard of the law," which Green Tree had conceded only occurred "when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case." *Id.* at 24a (citing Green Tree brief

and state case). Accordingly, because the Green Tree arbitration clause was silent and because the availability of class arbitrations under that contract language had not been settled at the time of the *Bazzle* and *Lackey* arbitrations, "the arbitrator did not act in manifest disregard of the law by permitting [the class arbitration] to proceed." *Id.*[1]

REASONS FOR DENYING THE PETITION

The state supreme court's decision to uphold an arbitrator's decision to proceed with a class arbitration is consistent with this Court's decisions holding that the FAA does not preempt state law that is not in conflict with a federal standard. Neither the FAA nor the arbitration agreement speaks to the question of class arbitrations, so no such conflict can exist. Moreover, the assertions by Petitioner of a "deep and mature" conflict among various federal and state courts fundamentally misunderstands the legal basis on which those courts decided whether a class arbitration may proceed. All of the federal court decisions cited by Petitioner that deny class arbitration or class consolidation do so as a construction of the Federal Rules of Civil Procedure. But this Court has expressly held that those rules have no application in state courts, which are free to adopt their own procedural rules. Some States, like South Carolina, have developed their own state law to allow class arbitrations, and other States have not. Absent an intent by Congress for the FAA to occupy the entire field of arbitration procedures – which this Court has held Congress had no intent to do – the different approaches by the several States are part and parcel of our system of federalism.

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[1] The court further noted that a 1997 amendment by the General Assembly to the penalty provision of the Preference Statute "provided specifically that 'any actions filed as class actions, without regard to certification, prior to May 2, 1997, may proceed, but with remedies pursuant to section 37-10-105 as amended.'" Pet. App. 24a n.23. The court concluded that the Arbitrator did not act in manifest disregard of state law in awarding the penalties provided in the 1997 amendments to the Preference Statute.

Because the state supreme court explicitly applied South Carolina law and because the underlying claim rested on a state statute that authorized class actions to enforce its terms, there is no basis for asserting that the decision below raises any question on which courts disagree or that otherwise warrants this Court's review. In addition, an independent ground for affirmance is that the *Arbitrator* made the decision to proceed on a class-wide basis, and Green Tree cannot meet its heavy burden under this Court's decisions to demonstrate why a court should disregard its highly deferential standard of review of an arbitrator's decision.

I. THE STATE SUPREME COURT APPLIED STATE LAW AS PERMITTED UNDER THE FAA AND THIS COURT'S DECISIONS

A. The FAA Expressly Reserves A Role For State Law In The Enforcement Of Arbitration Agreements

The Federal Arbitration Act was enacted to abrogate the general common law rule against the enforcement of arbitration agreements. *See* S. Rep. No. 68-536, at 2-3 (1924). Under the FAA, "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, that language reserves a role for States to play in the enforcement of arbitration agreements. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

The respect for state rules by Congress in its enactment of the FAA is reflected throughout the Act. Specifically, Congress provided for enforcement of arbitration under the FAA in the federal courts, over which it exercises supervisory power, but was completely silent about the procedures

that state courts should follow in determining how to enforce state arbitrations. Section 3 provides that, "[i]f any suit or proceeding be brought *in any of the courts of the United States* upon any issue referable to arbitration," the court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Similarly, Section 4 confers a right on "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court" for appropriate relief. *Id.* § 4.

The Act imposes no similar procedural requirements on state courts, and this Court has expressly disavowed holding that FAA §§ 3 and 4, "which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." *Volt*, 489 U.S. at 477 n.6 (citations omitted); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) ("[W]e do not hold that §§ 3 and 4 of the [FAA] apply to proceedings in state courts."). Accordingly, this Court has explained that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules." *Volt*, 489 U.S. at 476. States are thus free to determine whether, under state law, arbitrations may proceed on a class-wide basis.

B. The South Carolina Supreme Court's Application Of State Law Is Not Preempted By The FAA

1. Well-established preemption doctrine confirms that Congress had no intent to divest the States of authority to permit arbitrations to proceed on a class-wide basis. "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Thus, a court analyzes a claim of preemption of state law by the FAA under settled conflict preemption principles – "that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See*

also Geier v. American Honda Motor Co., 529 U.S. 861, 873 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Under this standard, there is no conflict with any principle announced in federal law. The FAA is completely silent as to whether an arbitrator may order a class arbitration and whether a state court asked to enforce such an arbitral award may do so. Notwithstanding Petitioner's hyperbolic rhetoric about the South Carolina approach being "hostil[e]" to arbitrations, Pet. 12, in fact the State's approach facilitates the purposes of the FAA by empowering consumers collectively to resolve their disputes in arbitration, rather than through litigation, particularly where the likely individual recovery is small and the claimant's costs of pursuing a remedy great.

2. The state supreme court fully appreciated and applied those preemption principles in determining that, where an arbitration agreement is silent on the subject of class arbitrations, a state court may uphold a decision by an arbitrator to conduct a class arbitration under South Carolina law. The court below rested its decision to allow class arbitrations where the agreement is silent on several important principles of South Carolina law. As the court stressed, it "can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent." Pet. App. 20a.

First, the court noted that South Carolina law "favors arbitration of disputes." *Id.* at 17a (citing *Heffner v. Destiny, Inc.*, 471 S.E.2d 135 (S.C. 1995)). That justification in itself is completely consistent with the underlying policy of the FAA to enforce arbitration clauses. *See* 9 U.S.C. § 2. The court further explained that its decisions had held that "'general principles of state law apply to arbitration clauses governed by the FAA.'" Pet. App. 17a (quoting *Munoz*, 542 S.E.2d at 364). That state law preference led the court to stress that allowing arbitrations to proceed on a class-wide basis fully comported with the intent of the drafting party

to seek its favored arbitration procedures for resolving any dispute with the non-drafting parties. *Id.* at 17a, 22a n.21.

Second, the state supreme court properly invoked state decisional law to hold that, when a contract contains an ambiguity, it "should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id.* at 17a (citing *Myrtle Beach Lumber*). As the court noted, this state law principle of contract construction flows from the notion that "the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Id.* Indeed, that principle is so generally applicable in the common law of contract that the state supreme court invoked this Court's decision in a closely analogous case for the same principle. *See id.* at 18a (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), for the proposition that the common law of contract required "construing ambiguous language against the drafting party"). For that reason, it was reasonable for the court below to interpret ambiguous silence about class arbitrations in the agreement against Green Tree, which drafted the contract. *Id.* at 17a.

Third, the court employed state law to construe other language of the arbitration clause drafted by Petitioner in a way that does not foreclose class arbitrations. Green Tree had argued that the phrase "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*" must be construed to prohibit class arbitration in South Carolina. *See id.* at 19a. The state supreme court rejected that reading of the contract, holding that under state law, "[a]t best, [that language] creates an ambiguity" that must be "construed against the drafting party, Green Tree." *Id.* As this Court has stressed, the state supreme court's "interpretation of private contracts is ordinarily a question of state law, which

this Court does not sit to review." *Mastrobuono*, 514 U.S. at 60 n.4 (quoting *Volt*, 489 U.S. at 474).[2]

The state supreme court's treatment of class arbitrations thus follows this Court's analysis in *Mastrobuono*. There, the Court held that, where an arbitration agreement was silent on whether an arbitrator could award punitive damages, the arbitrator could award such damages if permitted under state law. 514 U.S. at 62-63. In holding the agreement ambiguous, this Court emphasized that "a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 62. "The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

3. The court below also correctly rejected as inapplicable the analysis of federal court decisions under FAA § 4. First, the court reasonably questioned whether Section 4 even applies to state court decisions regarding arbitrations, in light of this Court's statements to that same effect. *See* Pet. App. 20a (citing *Volt*). Second, the court noted that the *Champ* decision had analogized class arbitration to the consolidation of arbitration, holding that the same rule should apply for both procedures. *Id.* at 21a. Because federal cases had held that consolidated arbitrations could not be permitted under the Federal Rules of Civil Procedure, the court below reasoned that *Champ*'s approach did not foreclose class arbitration in a State that *permitted* consolidation of arbitration, such as South Carolina. *Id.* Indeed, a more recent Seventh Circuit decision recognizes that, where the arbitration clause is ambiguous, it may be construed against the drafter to permit consolidated arbitrations. *See Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 776 (7th Cir. 2000) (noting that problems with separate arbitrations "are avoided by inter-

[2] The contract also provides for arbitration of "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract," Pet. App. 110a, language that is sufficiently ambiguous to permit an arbitrator to construe it as conferring authority to order the arbitration to proceed on a class-wide basis.

preting the contract to allow [multiple parties] to demand a single arbitration, provided there is a single dispute").

Finally, and most importantly, the court below appropriately stressed that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. In making that final point, the state supreme court explained its decision in terms captured by FAA § 2, the "grounds as exist at law or in equity" for revocation of a contract. The court made quite clear that enforcing an adhesion contract in these circumstances would be unfair – where "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Id.*; *see also id.* at 22a n.21. That invocation of state law is perfectly consistent with the FAA and this Court's decisions construing it.

II. PETITIONER'S ALLEGATION OF A "CONFLICT" IS ILLUSORY

A. All Of The Federal Cases Cited By Petitioner Rest On An Application Of Federal Law That Is Absent From This Case

In basing its decision solely on South Carolina law, the state supreme court did not bring itself into conflict with those federal courts that have construed the Federal Rules of Civil Procedure to prohibit class arbitration. The fact that the federal rules do not permit federal courts to compel class arbitration does not mean that state courts may not construe state law to permit an arbitrator to proceed with a class arbitration under a state law that expressly contemplates class relief. It is axiomatic that there can be no conflict warranting this Court's review unless the courts are in disagreement about the same rules. *See generally* Robert L. Stern et al., *Supreme Court Practice* 456 (8th ed. 2002). Here, Green Tree misunderstands the different legal bases on which federal and state courts have determined whether a class arbitration may proceed.

1. The federal cases cited by Petitioner are readily distinguishable. In *Champ v. Siegel Trading Co.*, the intervenors asserted that Federal Rule of Civil Procedure 81(a)(3) should be read to authorize district courts "to order these individual arbitration claims to proceed on a class basis." 55 F.3d at 274. In rejecting that contention, the Seventh Circuit squarely based its decision on federal law, noting at the outset that its holding was limited: "We . . . adopt the rationale of several other circuits and hold that section 4 of the FAA forbids *federal* judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275 (emphasis added). The court next emphasized that Rule 81(a)(3) "only applies to *judicial* proceedings under the FAA," *id.* at 276, and thus served as no bar to a conclusion by an arbitrator to proceed on a class-wide basis. The Seventh Circuit then explained that it was following the lead of other circuits that had rejected the use of the Federal Rules of Civil Procedure to authorize federal district courts to order consolidation of individual arbitrations. *Id.* at 274-75. As the court below noted in distinguishing *Champ*, South Carolina law is precisely the opposite of the federal rules: to *allow* consolidation. Pet. App. 21a.

Finally, while expressing "doubts" about the argument, the Seventh Circuit itself recognized that a different rule could apply under a State's law concerning an arbitration implicated by the FAA. The court specifically noted that "[t]he intervenors do not argue that Illinois' arbitration law authorizes class arbitration, so we need not determine whether we would follow the First Circuit's holding" in *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988), which applied a state law authorizing consolidated arbitration. 55 F.3d at 275 n.2.

Nor is *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001), in conflict with the decision below. In that case, the Eighth Circuit applied circuit precedent to hold that the federal district court could not order class arbitration. *Id.* at 728-29. That court expressly

reserved the question decided by the court below, noting that "[t]he construction of an agreement to arbitrate is governed by the FAA *unless the agreement expressly provides that state law should govern.*" *Id.* at 729 n.9 (emphasis added) (noting that "there is no such express provision in the arbitration clauses"). As the South Carolina Supreme Court noted, it had earlier construed the very same arbitration clause and had applied South Carolina law in doing so. *See* Pet. App. 17a (discussing *Munoz*).

Thus, the only two federal court of appeals decisions that directly address the applicability of class arbitrations specifically leave open the question decided by the state supreme court: whether a state law permits a class arbitration to proceed. That, in turn, was the very basis on which the court below decided this case. *See id.* at 22a-23a.

2. For that reason as well, the state cases cited by Green Tree as supposedly conflicting come to the unremarkable and ultimately irrelevant conclusion that their own state law does not permit class arbitrations. In *Stein v. Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001), for example, the Washington Court of Appeals noted that the party seeking class arbitrations had "fail[ed] to cite relevant statutory provisions that conflict with arbitration of his claims." *Id.* at 1270.

Similarly, the Alabama decision cited by Green Tree is inapposite. In *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), the Alabama Supreme Court concluded that Alabama state procedural law should follow federal decisions construing the Federal Rules of Civil Procedure. *See id.* at 20 & n.4 (noting that federal decisions "bar[ring] district courts from applying Rule 42(a), F.R.Civ.P., to require consolidated arbitration" are "persuasive authority in our state courts"). A recent decision of the Alabama Supreme Court – decided prior to Green Tree filing its petition for a writ of certiorari, however – casts substantial doubt on whether Alabama law in fact is as hostile to class arbitrations as Green Tree suggests. In *Leonard*

v. Terminix International Co., No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) (per curiam), the Alabama Supreme Court decided a case much more closely analogous to the decision below, holding that "the preclusion of eligibility for class-action treatment by inserting a provision requiring arbitration . . . lead[s] us to conclude that Terminix has extracted unreasonably favorable and patently unfair terms in its contract of adhesion." *Id.* at *8. Thus, applying "Alabama law relating to unconscionability," the Alabama Supreme Court held that arbitration clauses that denied class treatment could, in certain circumstances, be unenforceable. *Id.*[3]

Those state decisions rejecting class arbitrations, therefore, do so on the basis of their own State's law and not because they understand federal law to prohibit or preempt States from upholding an arbitrator's decision to proceed on a class-wide basis. Those decisions thus do not conflict in any way with the court's ruling below.

3. In an effort to make its assertion of a conflict appear more substantial, Green Tree cites numerous federal court of appeals decisions rejecting an argument that the Federal Rules of Civil Procedure – which apply to federal and not to state judicial proceedings – do not empower district courts to order *consolidation* of proceedings. In the proceedings below, Respondents did not make, and the South Carolina Supreme Court had no occasion to address, that argument – nor could they. Because this case proceeded entirely in South Carolina state court, there was no reason for the state courts to consider whether the Federal Rules of Civil Procedure condone or condemn consolidations. Accordingly, the federal decisions cited by Green Tree on consolidation

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[3] Green Tree subsequently changed its form contracts to include an express prohibition on class arbitrations: "Borrower agrees that Borrower shall not have the right to participate as a representative or a member of any class of claimants pertaining to any claim arising from or relating to this Agreement." *See* Respondents' Reply Br. to Amici Curiae, Exh. A (S.C. filed Aug. 28, 2001). Respondents are unaware of any decision yet construing the legality of that provision.

of arbitration under the federal rules simply have no bearing on this case.[4]

Indeed, those cases either do not address or expressly reserve the issue in this case: whether, under state law, a state court may enforce an arbitral award in which the arbitrator construed the arbitration agreement to permit class arbitration. *See, e.g., Baesler*, 900 F.2d at 1195 (noting that party seeking consolidation "makes no contention that North Dakota law contains such a provision" allowing consolidation). There is no basis, therefore, for Petitioner's suggestion that these federal cases support an assertion of a conflict with the state supreme court below.

B. Cases Upholding Class Arbitrations Have Done So On The Basis Of State Law

1. Similarly, in those few courts to have considered whether their State's law permits class arbitrations, the decisions allowing such arbitrations to proceed have done so based on state law. In *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998), the court stressed that,

[4] In any event, they expressly rest on interpretations of federal procedural rules that have no application in state court actions. *See Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 267 (2d Cir. 1999) (holding that Rules 42(a) and 81(a)(3) do not authorize consolidation or joint hearings in arbitration); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194-95 (8th Cir. 1990) (rejecting argument that Rules 42(a) and 81(a)(3) confer "power to order consolidation" on federal district courts); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 n.1 (11th Cir. 1989) (per curiam) ("we reject Protective's argument that district courts have the power to consolidate arbitration proceedings" under Rules 42(a) and 81(a)(3)); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 149-50 (5th Cir. 1987) (following Ninth Circuit in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), to hold that Federal Rules of Civil Procedure do not empower district courts to order consolidation); *Weyerhaeuser*, 743 F.2d at 636-37 (rejecting assertion that federal court "has the power to compel consolidation" under the FAA and Rules 81(a)(3) and 42(a)). In addition, some decisions make clear that they are simply following those cases in construing federal law, but do so without any analysis of the underlying law. *See, e.g., American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 107-08 (6th Cir. 1991) (following *Baesler*).

"[u]nder California decisional authority, classwide arbitration is permissible." *Id.* at 52 (citing cases). The California courts have construed their own code of civil procedure to allow consolidated arbitration proceedings, and the *Blue Cross* court explained that numerous decisions had upheld class arbitration under those state procedural rules because "'the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation.'" *Id.* at 54 (quoting *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

In similar fashion, the First Circuit upheld a consolidation of arbitration because, like the California code of procedure, the Massachusetts arbitration consolidation statute expressly authorized such procedures. *New England Energy*, 855 F.2d at 7.

Green Tree seeks to pique the Court's interest by asserting an inconsistency in the treatment of this issue by the Pennsylvania court and the Third Circuit. *See* Pet. 23, 28. Those cases, however, simply reflect the different substantive and procedural laws being applied. In *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), the Pennsylvania superior court upheld the right of a class arbitration to proceed, but did so because the State's Board of Arbitration of Claims had "adopted the entire Pennsylvania Rules of Civil Procedure to govern its own proceedings." *Id.* at 865. Because the claims being sought by plaintiffs/claimants were equitable in nature, the court determined that those procedural rules – which specifically allowed class actions – presented no conflict with the underlying substantive law on which the claim was based. By contrast, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the Third Circuit considered whether the federal Truth in Lending Act's allowance of class actions operated to alter the agreement of the parties to arbitrate their claims by expanding

the scope of the arbitration agreement to permit class arbitrations. Noting that this was "a question of first impression" and that "[n]o other federal appellate court has squarely addressed" it, the Third Circuit denied the authority of the federal district court to order class arbitration in proceedings brought to vindicate TILA claims. *Id.* at 370. The Third Circuit offered no opinion on whether Pennsylvania state substantive law and procedures were preempted in any way, nor did the Pennsylvania superior court offer any view on the applicability of federal law to arbitrations brought to vindicate federal claims. In any event, if this Court is truly concerned about the different treatment of class arbitration in cases brought in Pennsylvania's federal and state courts, the proper course would be to see whether a Pennsylvania court in the aftermath of *Johnson* follows or brings itself into conflict with the Third Circuit.

2. Green Tree cites only three States (California, Pennsylvania, and South Carolina), therefore, as permitting class arbitrations in certain circumstances,[5] and in those States the courts have done so relying on state rules that are inapplicable in federal courts. Green Tree seeks a federal one-size-fits-all approach that denies those States the right to use their own state law to vindicate state causes of action in state arbitrations. But this Court has stressed emphatically that, "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend the rule of liberal construction set forth in *Moses H. Cone* [*Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)], nor does it offend any other policy embodied in the FAA." *Volt*, 489 U.S. at 476.

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[5] Georgia also appears to allow class arbitrations for certain challenges to local taxes. *See Boynton v. Carswell*, 233 S.E.2d 185, 187 (Ga. 1977) (noting that "[t]here is no legal or practical reason why this class controversy [involving local tax disputes] could not be settled in a class arbitration"), *overruled on other grounds*, *Callaway v. Carswell*, 242 S.E.2d 103 (Ga. 1978).

III. THE ARBITRATOR'S DECISION TO PERMIT A CLASS ARBITRATION IS ENTITLED TO SPECIAL DEFERENCE AND IS AN INDEPENDENT GROUND FOR AFFIRMANCE

Throughout its submission, Green Tree ignores the substantial effect of one important facet of this case: the *Arbitrator* decided that this case should proceed as a class arbitration. Contrary to its recurrent suggestion, this case was not a situation of the South Carolina courts imposing their views on arbitration, but rather the *Arbitrator* making the decision to proceed with a class arbitration: "I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree." Pet. App. 84a. Under well-settled law, the Arbitrator's decision is entitled to special deference. Accordingly, this case presents the wrong vehicle for determining whether courts can impose on arbitrators a class action mechanism – here, the Arbitrator made his own independent judgment to construe the contract in that way.[6]

A. An Abitrator's Construction Is Entitled To Substantial Deference

Two Terms ago, this Court made manifestly clear that courts are not to disturb the findings of an arbitrator absent

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[6] The state supreme court's opinion might be read to leave the impression that the state circuit court's certification of the class in the *Bazzle* case preceded referral to arbitration and therefore compelled the Arbitrator to proceed on that basis. *See* Pet. App. 8a. The Arbitrator, however, was an experienced state judge who made clear in his opinion that he proceeded in arbitration based on a second amended complaint that contained class allegations, *see id.* at 59a, and that Green Tree had ample opportunity to object to inclusion of class members, *id.* at 68a, but chose not to do so. Moreover, the same arbitrator decided both cases, which had identical arbitration clauses, and he had opined on the class issue under the arbitration clause in the *Lackey* case on August 19, 1998 (*see id.* at 84a), long before the *Bazzle* case proceeded to final resolution in arbitration (*see id.* at 58a-59a). Finally at the specific request of Green Tree, all home-improvement transactions contained in the *Lackey* matter were consolidated with the *Bazzle* action. *See id.* at 29a.

extraordinary circumstances. Reiterating its long-standing rule limiting judicial review of arbitral awards, the Court stated that, "if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" *Garvey*, 532 U.S. at 509 (internal quotation marks omitted). For that reason, even if the court is convinced that the arbitrator committed "serious error," that "does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority." *Id.* at 510.

That deference flows from basic contract principles: by agreeing to submit the construction of their contract to an arbitrator, the parties bargained for the procedures he devised. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Green Tree made this trade – indeed, it affirmatively sought to avoid the court's decision-making process though adhesion contracts. Thus, if this Court were to undo the Arbitrator's procedural and substantive disposition of the dispute, such a decision would unravel the very requirement to arbitrate that Green Tree imposed on Respondents. *See W.R. Grace & Co. v. Local Union* 759, 461 U.S. 757, 764 (1983) ("When the parties include an arbitration clause in their . . . agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator."); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.").[7]

B. The Fact That The Class Decision Was Made By The Arbitrator Is An Independent Ground Of Affirmance

Green Tree has made no effort to demonstrate that the special deference afforded to an arbitrator's decision can be overcome or that a conflict exists over how the state supreme court applied *Garvey* to uphold the arbitral award. Thus, to even reach the question that Green Tree has presented, this Court would first have to ignore its long-standing precedent affording deference to an arbitrator's construction of a contract, hold that the contract must be construed to prohibit class arbitrations, and then determine that the South Carolina courts lacked authority to uphold the arbitral award under state law because the FAA preempts the State's authority to do so.

But there is no basis for this attack: as is well-established, "[a]n arbitrator enjoys wide latitude in conducting an arbitration hearing," and "[a]rbitration proceedings are not constrained by formal rules of procedure or evidence." *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1293 (9th Cir. 1987) ("The scope of review of an arbitrator's decision is extremely narrow."). Moreover, "[t]he arbitrator has great latitude in construing ambiguous language in the contract, and a court must not vacate an arbitration award simply because the court disagrees

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[7] Moreover, this particular arbitration agreement conferred authority on the Arbitrator to exercise "all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 110a. Reasonably construed, such broad powers encompass the authority to order arbitrations to proceed on a class-wide basis.

with the arbitrator's construction of the contract." *Hoteles Condado Beach*, 763 F.2d at 41.

Here, consistent with that latitude, the Arbitrator read the contract and observed that there was no express provision prohibiting class-wide treatment. He accordingly construed the contract's ambiguity on the issue of class certification against Green Tree, which drafted the contract. Green Tree cannot plausibly show a violation of FAA § 10 to the effect that the result was induced by fraud, corruption, bias, or disregard of the law. *See* 9 U.S.C. § 10; Pet. App. 24a (noting that unresolved issue of state law meant that "arbitrator did not act in manifest disregard of the law by permitting [the class arbitration] to proceed"). Nor can Green Tree show that the Arbitrator refused to hear pertinent evidence or otherwise engaged in misconduct. *See* Pet. App. 23a-24a. Absent such misconduct, there is no basis warranting the extreme remedy of overturning the Arbitrator's decision. *See Garvey*, 532 U.S. at 509.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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